1954

Gaddis Investment Co. v. Charles H. Morrison : Brief of Appellant

Utah Supreme Court

D. H. Oliver; Attorney for Appellant;

In the
Supreme Court of the State of Utah

GADDIS INVESTMENT COMPANY,
a Corporation, et al.,
Respondents,

vs.

CHARLES H. MORRISON,
Appellant.

Case No.
8188

APPELLANT'S BRIEF

D. H. OLIVER,
Attorney for Appellant.

ARROW PRESS, SALT LAKE

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STATEMENT

On the face of the complaint, this action appears to be an action to recover a brokers commission for the sale of certain real property. The appellant contends, and the evidence supports such theory, that the real motive and underlying purpose and effect of this action is to secure the aid and sanction of the Court in maintaining an insidious medium or channel through which the Real Estate Board may segregate people on the basis of race and color.

On August 1st, 1952, appellant listed his property with respondents for sale. On August 9th respondent found a prospective purchaser. This purchaser happened to be a Negro. After the earnest money contract had been signed by both parties, the abstract to the property disclosed that there was a covenant contained therein which forbade the sale of this property to negroes. Upon this discovery, the respondents immediately repudiated the transaction and refunded the earnest money to the buyers. The appellant was informed of this restriction and advised that he would have to await the approval of the real estate board before the sale could be completed. This the appellant refused to do and upon refusal of respondents to proceed with the sale, the defendant repudiated his listing contract with respondents and made the sale himself.

Several days after the property had been sold, the respondents notified appellant that they had secured the approval of the real estate board and demanded a commission which the appellant refused to pay.

The substance of the pleadings, evidence and findings of the court will be set forth in this brief.

THE PLEADINGS

The charging part of plaintiff's Amended Complaint alleges (R. 15):

> "That the defendant is indebted to plaintiff's in the sum of $370.00 for services performed by plaintiffs for the defendant at his request on or

about the 9th day of August, 1952, in and about the sale of certain real property, pursuant to a certain listing agreement signed by the defendant and dated August 1st 1952."

The defendant filed his answer (R. 24-25) admitting the execution of the listing contract but denying the sale by plaintiffs, and further alleging, as an affirmative defense thereto after setting forth the language of a restrictive covenant, alleging:

> "5. That upon the discovery of this covenant, the plaintiff's repudiated and abandoned their contract to sell said property to Thomas C. Allen and refused to have anything further to do with said sale for the reason, and solely for the reason, that Thomas C. Allen was not a member of the Caucasian race."

THE EVIDENCE

Exhibit P-1 is the listing agreement between defendant and Knight Realty Co. There is no provision in this contract which requires the defendant to submit a sale to colored people to the Real Estate Board for approval. If such a stipulation had been actually contained in this listing, it would be void and unenforcible, under the ruling in the *Shelley* vs. *Krammer* case.

Exhibit P-2 expressly provides, lines 26-27:

> "This payment is received and offer is made subject to the written acceptance of the seller endorsed hereon within one day from date hereof, and unless so approved the return of the money herein receipted shall cancel this offer without damage to the undersigned agent."

Exhibit D-3 provides, among other things as follows; page 19:

> "No part of the hereinafter described land shall during the life of this covenant be used, owned, occupied by or sold to, conveyed, leased, rented or given to any other person or persons other than those of the Caucasian race, excepting that this covenant shall not prevent occupancy by domestic servants of a different race or nationality employed by a tenant or owner.
>
> " 'These covenants shall run with the land and shall be binding upon all parties and all persons claiming under them until Jan. 1, 1995'."

On behalf of plaintiffs, Ben Boyce testified, (R. 32):

> "Q. Is the Gaddis Investment Company and Knight Realty Company, the other plaintiff, members of what you call the Multiple Listing Board?
>
> "A. Yes sir.
>
> "Q. Real Estate Board of Salt Lake?
>
> "A. Yes sir."

In describing what happened after Ex. p-2 was signed, Mr. Boyce said, (R. 35):

> "In the meantime, while he was gone, I went and got the abstract, and as I come in the office with the abstract, Mr. Gaddis says, 'You had better hold this deal up until I can get it cleared' or 'until we get it cleared.' I don't remember just his words * * *."

"Q. You told him to get it cleared you had to clear it by reason of what?

"A. Well, Mr. Gaddis didn't explain to me. He said that there was some question about selling that place to colored people.

"Q. That is the reason you wanted to get a clearance, was it?

"A. That's right."

On cross-examination Mr. Boyce testified, (R. 37):

"Q. After you got the abstract you say Mr. Gaddis told you you had better hold the transaction up. Is that right?

"A. Until it was cleared.

"Q. Until what was cleared?

"A. The property, give us permission to sell to colored people (R. 38).

"Q. Who did you have to get permission from?

"A. You will have to ask Mr. Gaddis that.

"Q. You had Mr. Morrison's permission, didn't you?

"A. Yes sir.

"Q. He was the only man involved in this particular piece of property, wasn't he?

"A. As far as I know.

"Q. He had the final say as to whether he wanted to sell or not, didn't he?

"A. I guess he did."

In regard to the Allens getting their money back, Mr. Boyce testified, (R. 42):

> "Q. Do you know why they got it back?
>
> "A. Well, because, as I have said before, I told them we had to hold it up, and my time had expired as far as holding their money is concerned."

Thomas E. Gaddis, Manager of Gaddis Investment Co. was called as a witness for defendant, and testified as follows, (R. 48):

> "Q. You also heard the testimony of Mr. Boyce with reference to your telling him to hold up that transaction?
>
> "A. I remember.
>
> "Q. Did you tell him to hold up that transaction?
>
> "A. Yes.
>
> "Q. Why?
>
> "A. Under the ethics rule of the National Association of Real Estate Boards, they say that you —a realtor shouldn't sell any one into a district that might depreciate the district. As a result of that, the Salt Lake Real Estate Board has an ethics committee, and when there is any question about selling, that is, completing a sale, as far as we are personally concerned, why, we take it up to the real estate board ethics committee. I told Mr. Boyce—
>
> "Q. May I ask, at the time that this transaction came to your office, was there any question about that sale, that particular sale?
>
> "A. Purely the question of selling a colored man into a totally white man's district, if it was such.

"Q. And where did you discover that there was a question about selling to colored people?

"A. There is always a question.

"Q. Well—with reference to this particular transaction?

"A. When the question came up to me, I told him that the people down there objected to some extent and had signed some kind of agreement which the lawyers told us was unconstitutional, but I would take it before the ethics committee. It would take a little time. I proceeded to do that. I took it before the ethics committee. They held it and approved the sale. It took about ten or fifteen days. They approved the sale to this gentleman here (referring to Thomas C. Allen) because I told Mr. Boyce to check the district, and I found either twelve or fifteen families, colored families in the district, and they thought it was alright to sell to a colored man in that district, so the sale was approved by the ethics committee of the Salt Lake Real Estate Board in writing.

"Q. Well, now, is there anything in that contract, that Exhibit P-2 that you have in your hand, that requires Mr. Morrison to wait until the real estate board or anybody else approves the sale of his property?

"THE COURT: I think he wouldn't need to answer that. It would speak for itself. I don't understand—let me interrupt a minute Mr. Oliver. I don't understand whom you told that you would have to take it up with the ethics board. Was that Mr. Morrison?

"A. Our salesman, Mr. Boyce.

"THE COURT: Oh. Excuse me.

"Q. Did you talk to Mr. Morrison about this restriction?

"A. I don't remember whether I talked to Mr. Morrison or not. I talked to Br. Boyce on it, and I believe Mr. Boyce talked to Mr. Morrison."

In regard to the earnest money paid by the Allens, Mr. Gaddis testified, (R. 50):

"Q. Did you advise your cashier or whoever handled the money to refund the earnest money to Mr. or Mrs. Allen?

"A. I think I talked to Mr. Boyce and told him if the man demanded his money back he would have to give it to him, but we would still hold the seller to the contract * * *."

Richard Waldis, salesman for Knight Realty, testified on behalf of defendant, (R. 59):

"Q. You were advised by the office of the real estate—Salt Lake City Real Estate Board that the listing may be canceled, and you so advised Mr. Morrison, didn't you?

"A. That is right.

"Q. And later, after the president returned and after the property had been sold, you were informed that it couldn't be canceled?

"A. That's right.

"Q. And you so advised Mr. Morrison?

"A. That's right.

Mr. Waldis further testified, (R. 63):

"Q. And what did Mr. Knight say in regard to this transaction, whether it should be gone through with or canceled?

"A. His only reaction was that he didn't want to be involved in it at all.

"Q. But he did tell you that he didn't want to be involved in it at all?

"A. That's right.

"Q. Did he tell you why he didn't want to be involved in it?

"A. No, he didn't say why.

"Q. Do you know why?

"A. It would only be an assumption."

Marry Allen, one of the purchasers involved in the transaction, testified in regard to what took place (R. 68):

"Q. And what was that conversation?

"A. Well, the conversation was that he could not sell this property to me, that I could come and get my money, because—it was something in the contract about being a covenant of some type and he was—they would probably discharge him from his job; lose his job over it.

"Q. He would probably lose his job?

"A. Uh huh.

"Q. And you could come and get your money?

"A. Come get my money.

"Q. And what did you do after that?

"A. I went and got my money."

On cross examination, Mrs. Allen testified, (R. 69):

> "Q. Now, Mrs. Allen, wasn't your conversation that you had with Mr. Boyce in substance this, that he couldn't sell to you people until the matter was cleared?
>
> "A. He didn't state it.
>
> "Q. Are you positive?
>
> "A. I am positive he didn't because—
>
> "Q. You say he told you he couldn't sell or he said he would lose his job?
>
> "A. Probably lose his job.
>
> "Q. Are you sure of that?
>
> "A. Yes."

Mr. Allen testified as to the details of the conversations he had with the salesman (R. 71) wherein they discussed the problems of restrictions, and after signing the contract, he went back to Sunnyside, 150 miles away and left the closing of the deal up to his wife.

The defendant testified in his own behalf, beginning (R. 72) wherein he gave a detailed account of the entire transaction, and at (R. 75) he testified:

> "Q. And did you have any conversation with Mr. Boyce or the Gaddis people about the selling of the property after you made your investigation?
>
> "A. Well, I asked them why it couldn't be sold. I said, 'It seems like I am willing, the people that want to buy is willing, and I really don't see any objections. We are the two principals.'

"Q. Who did you tell that to?

"A. Mr. Boyce.

"Q. And what did he say?

"A. Well, he said that they couldn't go through with the sale until they had an okeh from the real estate board.

"Q. And what did you say to that?

"A. Well, I told him I couldn't see what the real estate board had to do with it.

"Q. Then what did he say?

"A. Well, he was pretty vague about it. He didn't want to go ahead and sell. He just said they would have to have an okeh from them before they could go through with it."

The complete record of defendant's testimony is contained in the Record, pages 72 to 80, which we respectfully request that the Court read in full.

Elmer R. Smith was called as an expert in race-relations and sociology (R. 81 to 83).

The purpose of this testimony was to show, as a matter of fact, that law suits of this type would have an adverse effect on the rights of minority groups to purchase property in the open market and aid the real estate interest and other racist in maintaining and perpetuating racial segregation:

"THE COURT (R. 82): I don't want to hear it. I don't think I need that. You can be excused Mr. Smith."

THE FINDINGS (R. 95)

4. That on or about the 1st day of August 1952, the dependant entered into a written contract with the plaintiff, Knight Realty Company, and or its agents, wherein defendant agreed to list his real property with plaintiffs for sale, and that if plaintiff procured a buyer for said real property, said defendant agreed to pay to plaintiff the regular commission of 5% of the sale price of said property, and that said agreement was in force for a period of six months from date thereof.

7. That on or about the 9th day of August 1952, the plaintiffs did procure a buyer for the defendant's real property so listed for sale with the plaintiffs, for the sum of $7400.00, and that said buyer was able and willing to buy said property, and pursuant thereto the defendant and said buyer did enter into a written contract for the sale and purchase of said real property, and that said sale agreement was consummated and perfected, and said sale was made by the defendant to said buyer.

There is no finding as to whether or not the listing contract was breached by respondents. There is no finding on the issue as to whether or not the defendant should have secured the approval of the real estate board. In short, there is no finding on the issues presented by the evidence.

STATEMENT OF POINTS

1. The Court, as an arm of the State, had no power to lend its aid to the scheme revealed by the evidence in this case.

2. The Court erred in excluding the proffer of Elmer R. Smith.

3. The Court's findings do not reflect the evidence.

4. The judgment is contrary to law and the evidence.

To sustain this appeal the appellant relies on the following:

PROPOSITIONS OF LAW

I

STATE COURTS CAN NOT BE USED TO ASSIST PRIVATE CORPORATIONS OR INDIVIDUALS IN ABRIDGING THE PRIVILEGES AND IMMUNITIES GUARANTEED TO CITIZENS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

II

IT IS THE DUTY OF THE TRIAL COURT TO FIND THE FACTS SPECIALLY AND STATE SEPARATELY ITS CONCLUSIONS OF LAW THEREON.

III

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF ELMER R. SMITH.

IV

WHEN ONE CONTRACTOR REFUSES TO PERFORM ANY PORTION OF THE AGREE-

MENT, THE OTHER MAY TREAT THE WHOLE CONTRACT AS ABANDONED.

ARGUMENT

I

STATE COURTS CAN NOT BE USED TO ASSIST PRIVATE CORPORATIONS OR INDIVIDUALS IN ABRIDGING THE PRIVILEGES AND IMMUNITIES GUARANTEED TO CITIZENS UNDER THE 14TH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Jackson vs. *Barrows,* 247 P. 2nd 99;

Shelley vs. *Krammer,* 334 U. S. 1; 92 L. Ed. 1161;

Buckhannan vs. *Warley,* 245 U. S. 60; 62 L. Ed. 149;

Marsh vs. *Alabama,* 326 U. S. 501, 90 L. Ed. 265;

Art. I Sec. 1, Utah Constitution;

Title 8 Sec. 42, U. S. Code.

The substantive question presented here is whether a State Court can, consistantly with the Constitution, lend its aid and assistance to the Salt Lake Real Estate Board in its effort to circumvent and abrogate the decision of the United States Supreme Court.

Exhibit P-1 is the listing contract wherein the defendant employed the plaintiffs to sell his property. The first paragraph of this contract provides:

> "In consideration of your agreement to list the property described on the reverse side of this contract with the Multiple Listing Bureau of the Salt Lake Real Estate Board, and to use reasonable efforts to find *a purchaser* therefor, I hereby grant you for the period of six months from date hereof the exclusive right to sell or exchange said property or any part thereof, etc."

Note the phrase *"a purchaser"*. It is not qualified by any terms requiring the approval of the Salt Lake Real Estate Board, or its Ethics Committee or any other person or persons except the defendant.

The evidence is clear and without conflict that the transaction was held up by the respondents because of, and solely because of, a restriction against selling this property to colored people. The respondents do not hesitate to state that under the ethics of their profession they will not sell colored people into *a white man's district,* (see R. 48, line 22).

The effect of this scheme, as it is practiced throughout the nation by real estate brokers would be to regiment and segregate minority groups, or what the majority may call undesirables, into ghettos and slum areas, just as effectively as though the State had done so by legislation.

Article I Section 1 Utah Constitution provides:

> "All men have the inherent and inalienable right to * * * acquire, possess and protect property * * *."

The last clause of Section 1, XIV Amendment to the United States Constitution provides:

> "No state shall deny to any person within its jurisdiction the equal protection of the laws."

The question of legislating segregation was put to rest in this country in the case of *Buckhannan* vs. *Warley*, supra, where the Supreme Court held a Louisville, Kentucky Ordinance void. In *Shelley* vs. *Crammer*, supra, the same Court held that State Courts are an Arm of the State and, as such, can not be used to enforce private agreements between private citizens to violate the constitutional rights of other citizens.

In *Marsh* vs. *Alabama*, supra, an Oil Company owned and operated a small community in which its employees lived. The Company made a rule that no literature or pamphlets or other advertisements should be distributed in the community without first getting permission from the management of the Company. Jehovah's Witnesses went into the community and distributed their literature without getting a permit from the management as required to the company's rules. The defendants were tried and convicted in the State Court on a charge of trespassing, in violation of the company's rules. In this case the U. S. Supreme Court held that the defendants had a constitutional right to distribute literature which could not be abridged or circumvented by any rules of a private corporation, and that the State Court could not be used to enforce such a rule.

At page 509 the court said:

> "When we balanced the constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position. As we have stated before, the right to exercise the liberties safeguarded by the first amendment lies at the foundation of free government by men; and we must in all cases weigh the circumstances and appraise the reasons in support of the regulation of their rights. In our view the circumstance that the property rights to the premises when the deprivation of liberty, hereinvolved took place, were held by others than, the public is not sufficient to justify the States permitting a corporation to govern a community of citizens so as to restrict their fundamental liberties and the enforcement by the application of a State Statute. *Insofar as the State has attempted to impose criminal punishment on the appellant for undertaking to distribute religious literature in a company town, its action cannot stand.*"

As stated at the beginning of this brief, the restrictive covenant found in the chain of title to defendant's property lies at the foundation of this law suit, and by the same token that a state court cannot be used to enforce a company regulation prohibiting the distribution of literature in violation of the constitutional rights of citizens, we claim that the Salt Lake Real Estate Board may not use, what they call ethics, or by any other name which they may choose to call it, any device to circumvent and abrogate the rights of free people to contract freely with one another.

In the *Shelley* vs. *Krammer* case the direct question involved was whether or not the Covenant, per se, could be enforced in the courts; the court said no and since that time real estate interest and other racial bigots have sought ways means, techniques and devices through which the ruling of the court could be evaded. One of the common devices struck upon to accomplish this end is to sue the violator of the covenant for damages. Several such cases have reached the courts of last resort in several states.

Jackson vs. *Barrows*, supra, is a California case wherein this technique was resorted to. This case was decided in August, 1952, and all prior decisions from other jurisdictions reviewed therein.

In striking down this damage device, the California Court said, page 112:

> "The doctrine of the Shelley case, as we read it, means that no State sanction, direct or indirect, can constitutionally be imposed for the breach of a restrictive covenant if such sanction would result in the denial of Civil Rights guaranteed by the Constitution. Of all civil rights confered none is clearer and few more vital than the right to buy a home and live in it. Distinctions between direct and indirect State action is tenuous. The enforcement of a covenant by an action for damages furnished a potent motive to prevent use or occupancy of property by non-caucasians; that is, the indeminification of other property owners when a non-caucasian uses or occupies the property. The coercive device of retribution in the form of damages is as effective as the coercive effect of injunctive relief, although not as immediate. In addition to being subjected to a money judgment, the vexation and expense of a law

suit enhances the coercion. There can be no doubt that the threat to a covenantor of liability in damages, with consequent execution and sale, for disregarding a racial restrictive covenant, would operate as a deterant to the breaching of its terms; and, in the words of the Supreme Court of Michigan, would operate to inhibit freedom of purchase by those against whom the discrimination is directed. When a court undertakes to butress that threat by lending its power to give effect to the covenant, the court is facilitating the discriminatory purpose of the covenant and extending the full panoply of State power to its practical effectiveness.

> " 'The fact that non-caucasian is not a party to the action does not effect the result. In an action at law for damages the rights and interest of the particular non-caucasian would be secure and unaffected by any judgment rendered. However enforcement of the covenant would effectively deny non-caucasian citizens equality in the enjoyment of property rights because property owners in restricted areas are deterred from permitting use or occupancy by non-caucasians * * * *No person has the right, nor does the State have the power to require the enforcement of a covenant which will result in the denial to any individual of the equal protection of the laws. Any recognition of a racial restrictive covenant in an action in a State court constitutes prohibited State action.*' "For emphasis, lets repeat that last sentence:
>
> " 'Any recognition of a racial restrictive covenant in an action in a State Court constitutes prohibited State action'."

As a fortress to the rights guaranteed by the Constitution, the Congress provided, U. S. Code, T.8 Sec. 42:

> "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold and convey real and personal property."

At the trial, counsel for respondents admitted the law as enunciated herein, but contended that it is not applicable to this case because this is an action to collect a commission for the sale of property pursuant to a written contract, and not to enforce the terms of a restrictive covenant. But basically and fundamentally, this is erroneous.

Courts can take judicial notice of economic and social conditions of the community in which they are located, *Nat'l Bank* vs. *Beckstead,* 250 P. 1033, therefore, this Court is cognizant of the fact that, for all practical purposes, the Salt Lake Real Estate Board has a monopoly on the sale and/or transfer of all real property in Salt Lake County, and for this Court to hold, *as a matter of law,* that every client that lists his property with any member or agency of said Real Estate Board is legally bound to have the approval of the Real Estate Board's ethics committee before he can sell his property to any person not of the caucasian race or be liable in a suit for a commission, then this Court, *as an Arm of the State,* will give its approval and sanction to a technique of the Real Estate Board through which it can segregate people solely on the basis of race and color, and it is the contention of appellant that this type of State sanc-

tions are inhibited by the Constitution, and the form of the action in which such sanctions are sought is wholly immaterial.

In the first place the plaintiffs can not prevail upon their contract to sell because they breached that contract themselves. The breach of this contract is dealt with as a separate proposition in this brief.

A casual review of the evidence reveals that the restrictive covenant is at the root of all this litigation.

In the *Barrows* case at page 113, the court said:

> "An individual cannot consent to state court action the purpose and effect of which is to aid in discrimination based solely on race, to entrench segregation, and thus deny to a class of citizens the equal protection of the laws. The law which prohibits the end will not lend its aid in promoting the means designed to carry it into effect; it will not promote in one form that which it declares wrong in another."

If it had not been for the covenant there would have been no controversy. If the proposed purchaser had been white there would have been no necessity for holding the transaction up or getting approval from the Real Estate Board. But the proposed purchaser happened to be a negro and the property had that covenant in the chain of title, and thus we are, face to face with the proposition of whether or not the Brokers, Gaddis Investment Co., and Knight Realty Co., can force Morrison to seek the sanction of the Real Estate Board before he can sell his property to a colored person. This is exactly what Gaddis tried to do, but failed.

Under the law as pointed out herein Gaddis had no legal right to insist on Morrison violating the constitutional rights of the Allens, and in this Gaddis breached his own contract thus giving Morrison a legal right to repudiate the whole contract and do as he pleased with his property, which he did. For the court to say that Gaddis Investment Co. had a legal right to insist that Mr. Morrison was bound to wait for the approval of the Salt Lake Real Estate Board before he could sell his property to Thomas C. Allen, for the reason, and only for the reason, that Thomas C. Allen was a Negro, is to approve of the policy of said real estate board in not selling colored people into a white man's district, and in this we respectfully submit that the state court is without power to grant such approval.

II

IT IS THE DUTY OF THE TRIAL COURT TO FIND THE FACTS SPECIALLY AND STATE SEPARATELY ITS CONCLUSIONS OF LAW THEREON.

Rule 52 Utah Code 1953;

Baker vs. *Hatch,* 257 P. 673;

Baird vs. *Irr. Co.,* 257 P. 1060.

Rule 52 of the Utah Code provides:

> "In all actions tried upon the facts without a jury * * * the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment."

This statute has been part of Utah law for many years and we don't propose to bore this court with authorities on its construction, suffice to say that at least on two different occasions, *Baker* vs. *Hatch,* 257 P. 673 and *Baird* vs. *Irr. Co.,* 257 P. 1060, this court held:

> "It is the duty of the trial court in contested cases to find upon all material issues submitted for the decision unless findings are waived, and failure to so do is reversible error.

III

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF ELMER R. SMITH.

The rule is well settled, that any evidence which proves or tends to prove or disprove any issue involved in a trial of a cause is admissable in evidence, and it is reversible error to exclude such testimony, and to burden this court with authority would be a reflection upon this court's intelligence.

IV

WHEN ONE CONTRACTOR REFUSES TO PERFORM ANY PORTION OF THE AGREEMENT, THE OTHER MAY TREAT THE WHOLE CONTRACT AS ABANDONED.

Torrey vs. *Shea,* 155 P. 820;

Chaffee vs. *Widman,* 108 P. 995.

The *Torrey* case, supra, is a California case wherein the defendant contracted with the plaintiff for 40,000 tons,

per year, of hops for a period of three years. The plaintiff delivered the required amount of hops the first year. The second year the plaintiff delivered only 26,000 tons, thereupon the defendant cancelled his contract and got his hops elsewhere, and thereupon was sued by the plaintiff to recover on the contract.

After reviewing the evidence and the law with respect to breach of contract the court said:

> "This is so because the willful and inexcusable failure of one party to perform a material part of a contract on his part to be performed is tantamount to an abandonment of the entire contract; and clearly, if the plaintiffs in the present case so failed, they should not be permitted to recover damages for the refusal of the defendants to further comply with the contract."

In *Chaffee* vs. *Widman,* supra, the Colorado court said:

> "But, as we have seen, this contract was abandoned, and, so far as disclosed by the record, without any collusion between the Widmans and the Hawkinses or bad faith on their part. When a broker opens negotiations, but fails to bring the prospective purchaser and owner together, and they are abandoned without fault of the owner, and the latter subsequently sells to the same party, without further effort on the part of the broker, the owner is not liable to the broker for commissions."

CONCLUSION

1. We have pointed out wherein the court has no power to lend it aid or sanction to maintaining and perpetuating racial segregation by private industry or individuals through restrictive covenants, and wherein this action is designed for such nefarious effect.

2. We have pointed out wherein the court evaded the issue by failing to make specific findings of facts and conclusions of law based on the pleadings and evidence received on the trial of this cause.

3. We have pointed out wherein the court erred in excluding the testimony of Elmer R. Smith.

4. We have pointed out wherein exhibit P-1 does not provide for the finding of a buyer agreeable to the Salt Lake Real Estate Board; exhibit P-2 does not provide for the approval of sale by the Salt Lake Real Estate Board. We have shown, without dispute, that the plaintiffs refused to make this sale without such approval. We have shown wherein the defendant was under no obligation whatsoever to seek or await the approval of said Real Estate Board and we have shown wherein the imposition of such a condition by the plaintiffs constitutes a breach of, and abandonment of, their contract to sell and in this the defendant had a right to treat such a condition as a breach on the part of the plaintiffs and repudiate his contract with them and do as he pleased with his property.

In this we respectfully submit that this cause should be reversed and remanded to the lower court with direc-

tions to enter findings and conclusions in conformity with the evidence in this case and the opinion of this court and that said cause be dismissed with prejudice, with costs to appellant.

Respectfully submitted,

D. H. OLIVER,
Attorney for Appellant.